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COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Addendum

CONTENTS

Page

COMMENTS RECEIVED FROM MEMBER STATES

Japan . . . . . .

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OBSERVATIONS RECEIVED FROM MEMBER STATES

JAPAN

[Original: English]
[13 May 1994]

Overview

1. The system of law enforcement in International Criminal Law, such as investigation, prosecution and punishment of criminals, has been developed after World War II by obliging States, through the international law concerned, to make an act a crime under national law and to ensure that the perpetrator is prosecuted and punished by national courts. However, when we observe the poor situation concerning the punishment of war criminals so far, it is clear that the above-mentioned mechanism is not always effective.

2. Japan, based on the recognition that a fair and neutral International Criminal Tribunal, if duly established with the support of the international community and in order to prosecute criminal responsibility of individuals who have committed crimes under international law represents the final goal of international criminal law, wishes to be a supporter of its establishment. It is necessary, on the other hand, that its establishment should pay due consideration to the current state of development in international criminal law, States' sovereignty, and the constitutional requirements of States. At the same time, the Tribunal should be an organ which represents the highest standard of protection of human rights, based on the results achieved by the international community in this field.

3. The following three points should be secured in establishing an International Criminal Tribunal:

(1) The general principles of criminal law including the principle of legality (nullum crimen sine lege), fairness of the trial and the protection of human rights are respected.

(2) The effectiveness of the Tribunal's activities is assured.

(3) The Tribunal should be a realistic and flexible organ complementary to the existing system.

Japan appreciates the draft statute prepared by the Working Group of the ILC at its forty-fifth session as a good basis for future deliberations and as a proposal paying due consideration to the above-mentioned three points and to the ILC's basic propositions enumerated in paragraph 396 of the Working Group report annexed to the ILC Report on the work of its forty-fourth session, to which Japan gives full support.

4. In order that the Tribunal be truly effective, it should be established by a treaty, participation in which of as many States as possible is essential. It is also important that the establishment of the Tribunal does not interfere with the system such as the one adopted in case of drug-related crimes in which the existing international law enforcement

system has functioned rather well. In this connection it is appreciated that the ILC adopts a realistic approach in which the Tribunal, at least at the beginning, should not have compulsory jurisdiction, in a sense that jurisdiction ipso facto and without further agreement from a State party to the Statute.

5. Japan wishes to make some comments on draft articles of the Statute hoping to provide some guidance to the future work of the ILC. The ILC is requested to take into consideration these comments, and give careful revision and elaboration to the current draft articles. Tasks to be completed by the ILC might be difficult ones. However, Japan is trustful that the ILC will give successful answers to these points and fulfil the mandate given to it by the General Assembly to complete the elaboration of the Statute at its forty-sixth session this year. Japan reserves its right to present further comments on the future work of the ILC on this item.

Comments on the articles of the Statute

Article 2

6. Creation of the Tribunal as a judicial organ of the United Nations as proposed in article 2 is desirable in order to secure a solid base and full support of the international community to the Tribunal, while there remains the technical issue of how to reconcile this objective under the existing provisions of the Charter of the United Nations. Since the Tribunal is in principle an organ established by States parties to its Statute, it seems more practicable, at the moment, for the Commission to establish the Tribunal as an organ having some sort of a formal linkage with the United Nations by a treaty of cooperation.

Articles 6-13

7. Independence and fairness of the judges and the Prosecutor is one of the most important elements of the Tribunal. As for article 13, measures adopted in its subparagraphs 2, 4 and 5, in order to enhance the independence of the Prosecutor are welcome. On the other hand it should be clearly indicated in the Statute that the Prosecutor and the Deputy Prosecutor may not be nationals of the same State.

Article 15

8. In relation to the independence of the Prosecutor and the Deputy Prosecutor, the Court should not have the authority to remove these persons from office. Other systems should be prescribed for such removal, such as by majority vote of the States parties.

Article 19

9. Rules of procedure and evidence have a direct influence on the rights of suspects/accused. Therefore they should not be left to the discretion of the Court but should be dealt with more concretely and precisely in the Statute itself.

Articles 22-26 and 29

10. The structure of this part of the Statute is somewhat complicated. Japan, trying not to modify the content, has reorganized this part to make it clearer as follows:

(Japan's comments to this part of the Statute will consequently make reference to the following new article numbers.)

"The Court shall have jurisdiction over crimes listed in articles I, II and III when such jurisdiction is conferred to it in accordance with articles I', II', III' and X.

A complaint shall be submitted in accordance with article Y in order that the proceeding of a specific case should be brought before the Tribunal.

Acceptance of jurisdiction by States in cases of crimes covered by international conventions

Article I

List of crimes defined by treaties

(Art. 22 of the Working Group draft statute)

The Court may have jurisdiction conferred on it in respect of the following crimes:

(a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

(b) grave breaches of:

... continues the text of article 22 of the Working Group draft statute.

Article I'

1. Jurisdiction of the Court in relation to article I

(Art. 24 of the Working Group draft statute)

The Court has jurisdiction under this Statute in respect of a crime referred to in article I provided that such jurisdiction has been ceded to it in accordance with paragraph 2 below:

(a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts;

(b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of

Genocide, of 9 December 1948. (The Working Group draft statute has a second paragraph concerning consent of some States here.)

2. Acceptance by States of jurisdiction over crimes listed in article I

(Art. 23 of the Working Group draft statute)

Alternative A

(i) A State which is a party to this Statute and which has jurisdiction over one or more of the crimes referred to in article I in conformity with the relevant treaty may, by declaration lodged with the Registrar, at any time cede to the court its jurisdiction over that crime/those crimes.

(ii) A declaration made under paragraph (1) may be limited to:

(a) particular conduct alleged to constitute a crime referred to in article I or

(b) conduct committed during a particular period of time, or may be of general application.

(iii) A declaration may be made under paragraph (1) for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case six months' notice of withdrawal must be given to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

(iv) A State not a party to this Statute which is a party to the respective treaties concerned may, by declaration lodged with the Registrar, at any time cede to the Court its jurisdiction over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

* Alternatives B and C is also eligible in place of Alternative A.

Special acceptance of jurisdiction by States in cases not covered by Article I

Article II

(Art. 26, (2), (a) of the draft)

Crimes under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals;

Article II'

(Art. 26, (3), (a))

Both the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred notify the Registrar in writing that they specially consent or cede to the Court, in relation to that crime, jurisdiction over specified persons or categories of persons.

Article III

(Art. 26, (2), (b) of the draft)

Crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, aimed at the suppression of such crimes and which having regard to the terms of the treaty constitute exceptionally serious crimes.

Article III'

(Art. 26, (3), (b))

The State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts notifies the Registrar in writing that it specially cedes to the Court, in relation to that crime, its jurisdiction over specified persons or categories of persons.

Article X

(Art. 25 of the draft)

Jurisdiction conferred to the Court by the Security Council

Subject to article 27, the Court also has jurisdiction under this Statute over crimes referred to in articles I or II if the Security Council (under Chapter 7 of the United Nations Charter) decides that such jurisdiction should be ceded to the Court (by a specified State).

Article Y

(Art. 29)

Complaint

Any State which has ceded its jurisdiction to the Court pursuant to articles I', II', III' of the Statute with respect to the crime or the Security Council in case of article X; may by submission to the Registrar

bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed."

11. This part is the central core of the Statute. The jurisdiction of the Court is given rise to when the jurisdiction inherent to a State is ceded to the Court by the State. In other words, the Statute is based on the ceded jurisdiction principle. This is the theory through which the current international criminal law system is best reflected in a sense that it is only States which have and exercise criminal jurisdiction and this Court's jurisdiction is the one ceded from such States and exercised by the Court on behalf of these States. The principle also enables an individual to be brought before an international court by way of establishing rights and duties of States (and not of individuals concerned) through a treaty.

12. Although it is apparent that there lies this principle under the Statute, it is not expressly stated in its articles, thus leading to a possible misinterpretation of this part of the Statute. It is important that the ILC revises the articles to make them clearly reflect this principle. The articles reorganized in paragraph 10 above might offer a possible solution to this question.

13. It is appreciated, on the other hand, that the Statute enables each State to have a free choice whether to cede its jurisdiction to the Court or not, although it is a natural consequence which should have been indicated in the Statute that once the jurisdiction is ceded to the Court, jurisdiction of the ceding State does not exist any more, or, at least, the Court's jurisdiction is preferential to the jurisdiction of the domestic courts of the ceding State.

14. As for the crimes under the jurisdiction of the Court, Japan appreciates a flexible and realistic system adopted in the Statute in which the crimes under international law prescribed by existing treaties are the central core and the main subject of the Statute, and, at the same time, the Court's jurisdiction can be extended, by the request of some qualified States, to the crimes under general international law or crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty.

15. According to the Statute, three steps must be successfully accomplished for the Court to actually try an offender. The first step is to determine that the Court has jurisdiction over a case. The second is that the complaint is brought before the Court by some qualified States or by the Security Council. The third step is that when the accused is not present in the Complainant States or States which have ceded jurisdiction over the crime to the Court, somehow the accused should be brought before the Court. The Statute currently prescribes the first step rather restrictively so that too much burden would not be put on the third step, an idea which is agreeable to Japan. However, the first step should not be too restrictive, because the Court will never effectively function if there are too many requirements to be fulfilled for the Court to have jurisdiction. Japan is of the view that the requirements currently prescribed for the first and the second steps in

articles I'(1), II', III' and Y above (arts. 24, 26, (3), (a), 26, (3), (b) and 29 of the Statute) are generally acceptable and appropriate except for the requirement prescribed in article 24, paragraph 2 of the Statute, on which its view is expressed in paragraph 21 below.

Article I

(Art. 22 of the Statute)

16. It is important that the crimes listed in this article be limited to "crimes under international law", the commission of which constitutes a breach of fundamental legal interest of the international community. Therefore, it is not appropriate to include in this list drug-related crimes including those dealt with in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) for two reasons: one is that drug-related crimes are not "crimes under international law"; the second is that since the international cooperation mechanism is established for the suppression of such crimes, conferring on the Court an extensive possibility to acquire jurisdiction over these crimes under article I (art. 22) is neither necessary nor desirable.

17. Inclusion in this article of the crimes related to international terrorism for which the current law-enforcement system under universal jurisdiction is effectively functioning should also be looked at again carefully by the ILC.

18. New treaties prescribing crimes under international law which will be concluded after the Statute is in force might have provisions, such as article 5 of the Apartheid Convention, referring to, in one way or another, the possible use of the Court's jurisdiction as among States parties to the Statute and to the treaty concerned. It would be worth considering an inclusion of a new provision in the Statute which could accommodate such a use without necessarily going through the review process of the Statute in accordance with article 21. This is an idea of how to make best use of forthcoming new treaties as if they were Protocols to the Statute valid as among States parties to the Statute and to the treaties concerned.

Article I', paragraph 1

(Art. 24)

19. Paragraph 1 (a) refers to "any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts", a notion which requires explanation. Among treaties listed in article I (art. 22), there are some treaties in which establishment of some types of jurisdiction is discretional to States parties (e.g. Hostages Convention, art. 5, (1)(d)). There are others in which two types of jurisdiction are mentioned: the primary jurisdiction (e.g. Hostages Convention, art. 5, para. 1), and the secondary or complementary jurisdiction which should arise when a State in which the suspect is present does not extradite him/her to a State having the primary jurisdiction (e.g. Hostages Convention, art. 5, para. 2). Under these circumstances, it is appropriate to interpret that "a State which has jurisdiction under the relevant treaty to try the suspect"

should mean a State under whose jurisdiction, which was established by its domestic laws or other means in conformity with the treaty provisions, the crime concerned falls. It would be desirable that the ILC indicates a clear interpretation of the phrase such as the one referred to above.

Article I', paragraph 2

(Art. 23)

20. Japan supports the "opting in" system set out in Alternative A of the article for the reason that this approach best reflects the consensual basis of the Court's jurisdiction and best translates into a formulation the flexible approach which characterized the basic propositions accepted by the ILC in its forty-fourth session.

Article 24, paragraph 2

21. Paragraph 2 of article 24 should be deleted because of the following reasons:

(i) Generally speaking, States' practice shows that there is no need to ask for the consent of other States concerned (such as the State of nationality of the suspect or the State where the crime was committed, as the case may be) for a State to exercise its criminal jurisdiction. Taking into account this practice, and since the Court's jurisdiction is the one ceded from a State which originally had such jurisdiction over a specified crime, it is inappropriate to put additional and heavier requirements for this Court to exercise jurisdiction than for a State.

(ii) The Court's raison d'être would be seriously jeopardized, if the Court could not acquire jurisdiction when these requirements would not be satisfied.

(iii) The interest of a State to protect its own nationals cannot be a sufficient reason for preventing the Court from acquiring jurisdiction (i.e. the first step as explained in para. 15 above), due to the reason described in (i) above. When the suspect is present in the State of his/her nationality which has not consented to the Court's jurisdiction, the success or failure of the proceeding of the Tribunal depends not on whether the Court's jurisdiction could be claimed for the case (i.e. the first step) because jurisdiction should be claimed without the consent of the State of nationality, but on whether the transfer of the accused from his/her State of nationality to the Court (i.e. the third step as explained in para. 15 above) can be successfully accomplished. (Japan might review its position on this paragraph if its comment on art. 45 (see para. 28 below) will not be taken into account by the ILC.)

Article X

(Art. 25)

22. This article is important because it enables the Security Council to make use of the Tribunal instead of creating an ad hoc one. Japan is concerned that an expression of this article, "on the authority of the Security Council" is not very clear. Since the Statute is based on the ceded jurisdiction principle, it would be natural to consider that this article prescribes a case in which the Security Council, based on the measures taken under Chapter VII of the United Nations Charter, decides that jurisdiction of a specified State should be ceded to the Court. If the ILC wishes to include in this article the possible acquisition of jurisdiction by the Court through measures of the Security Council taken under Chapter VI of the United Nations Charter, Japan requests that the ILC will give prudent consideration to the appropriateness of the idea and to the possible relationship between the Court's jurisdiction and that of domestic courts in such case.

23. It is also to be studied that in the case prescribed by this article, who can bring the complaint in accordance with article Y (art. 29); should it be limited to the Security Council or can it be extended to other qualified States?

Article II

(Art. 26, (2), (a))

24. The definition of this category of crimes should be studied further. The principle of legality requires that the components of crimes and the relevant penalties should be defined clearly. The ILC is requested to work out a possible solution for this principle to be abided by as for this category of crimes, by such a way as providing in the Statute a list of crimes, if any, which fall in this category. In addition, these crimes can be punished only when committed after the Statute is in force.

Article 28

25. In order that the principle of legality is strictly abided by, things such as components of crimes, relevant penalties, applicable defences, extenuating circumstances, statute of limitation, and complicity should be defined clearly. If the ILC wishes to dispense with including such definitions in the Statute itself, it would be necessary to have recourse to national law for that purpose, since international criminal law is sometimes silent about them. National law, in that case, cannot be a mere subsidiary source, but should be one of the primary sources of applicable law.

26. Further study should be done by the ILC on which national law is applicable in a specified case or situation. One idea is to apply national law of the State which has ceded its jurisdiction to the Court. Applicability of national law of the State where the crime has been committed might be also worth considering.

Article 41

27. As for the language within brackets in subparagraph (a), Japan is of the view that, even if a State party to a treaty does not enact a domestic law to give effect to the treaty's provisions, it is by no means contrary to the principle of legality for the Court to punish a crime concerned on the basis of the treaty, when the treaty is promulgated after ratification or accession and the treaty provisions are clear enough to be applied in place of national law.

Article 45

28. An important character of the ceded jurisdiction principle is that even when the Court acquires jurisdiction ceded to it by a certain State, it does not affect the jurisdiction that other States have over the same crime. From this point of view, paragraph 1 of article 45 is not appropriate because if, due to this provision, domestic courts of States which have not ceded their jurisdiction to the Court were prevented from trying (exercising their jurisdiction over) the person who has already been tried under this Statute, it would have the same effect as if they had ceded their jurisdiction to the Court. Therefore, this paragraph should apply only to the domestic courts of States which have ceded jurisdiction to the Court, and it would be appropriate that other courts are merely obliged to take into account the extent to which any sentence imposed by the Court on the same person for the same act has been served. Japan believes that this approach is not contrary to paragraph 7 of article 14 of the International Covenant on Civil and Political Rights.

Article 53

29. As for the penalties to be imposed, it is very important that national law to be specified shall be applied by the Court within the framework set out by the international standards. See also Japan's comment on article 28 of the Statute (para. 25 above).

Article 58

30. Concrete references should be made, following the examples shown in articles 33 and 63, to the judicial assistance by States parties to the Statute which have not accepted the Court's jurisdiction over a crime and by States not parties to the Statute. Especially if such States have jurisdiction over the crime under the relevant treaty, it is possible for these States to conduct an investigation of the crime. It is important that efforts be made, as far as possible, to provide the Tribunal with information and evidence so collected by these States. It is also desirable that the judicial assistance and the surrender of the accused from such States to the Tribunal should be considered equal to and should have the same mechanism of the ones being practised between States as far as possible.

Article 63

31. As for paragraph 3, (c), it is important that States parties should endeavour to consider the request from the Tribunal for surrender in accordance with laws concerned of the requested States parties at least as if it were a request from a State. In this connection, it would be useful to mention in the Statute that if a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from the Tribunal with which it has no extradition treaty, it may, if it decides to extradite, consider this Statute as the legal basis for extradition in respect of crimes concerned.

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CONTENTS

Page

COMMENTS RECEIVED FROM MEMBER STATES 2

Czech Republic

COMMENTS RECEIVED FROM MEMBER STATES

CZECH REPUBLIC

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Status of the Tribunal and the relationship with the United Nations

The status of the International Criminal Tribunal should be governed by a multilateral international treaty which would at the same time provide for the relationship of the Tribunal with the United Nation system. It would not be practical, to establish the International Criminal Tribunal as one of the principal United Nations organs, because in such a case an amendment to the United Nations Charter would seem to be necessary. Now, when the establishment of the International Criminal Tribunal has become a realistic goal, it would not be wise to expose the hitherto results of the long years codification work to risks that the revision of the Charter implies.

The relationship of the Tribunal with the United Nations could be similar to the relationship of specialized agencies with the United Nations.

The Czech Republic therefore prefers the second alternative of Article 2.

Jurisdiction of the Tribunal ratione materiae

As far as the jurisdiction ratione materiae of the Tribunal is concerned, the draft statute puts special emphasis on crimes defined by international treaties. Nevertheless after the Second World War, crimes under general international customary law were prosecuted before international tribunals and their punishment is envisaged also in the Statute of the International Criminal Tribunal for Yugoslavia. Article 26 of the draft statute of the permanent International Criminal Tribunal extends the jurisdiction of the Tribunal to this category of crimes too.

The Czech Republic agrees with this concept. However Article 26 deals with two different questions at the same time: the jurisdiction ratione materiae in case of crimes under general international law and the way of acceptance of this jurisdiction. There is no reason why the question of jurisdiction ratione materiae could not be fully and comprehensively dealt with in a single article of the Statute Article 22. It would be preferable to insert the idea of Article 26, paragraph 2, subparagraph (a) in Article 22 as its second paragraph.

The jurisdiction of the Tribunal should in no case cover crimes under national law. The Czech Republic therefore recommends to delete subparagraph (b) of the second paragraph of Article 26.

As to the list of treaties on the basis of which Article 22 defines jurisdiction ratione materiae, it seems to be incomplete. Should the criteria for listing treaties in Article 22 be the existence of a precise definition of

the crime, the entry of the treaty into force as well as the treaty's largest acceptance by the international community, it is difficult to understand why the Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and the Convention against Illicit Trade in Drugs and Psychotropic Substances of 20 December 1988 are not on the list.

Another problem to be considered carefully is that not necessarily all the crimes defined by the above-mentioned treaties are of so serious nature as to be brought before the Tribunal. It would not be appropriate to overburden the Tribunal with cases which can be effectively punished by States themselves. A certain degree of seriousness of the breach should therefore be also a precondition for the jurisdiction of the Tribunal. The mechanism of the Tribunal should be reserved for the most serious international crimes, especially in the event when the prosecution before domestic courts cannot be guaranteed.

Acceptance of the jurisdiction of the Tribunal

From among the alternatives proposed by the Working Group, the Czech Republic would prefer Alternative B.

Nevertheless the Statute should provide for the establishment of an obligatory jurisdiction of the Tribunal which would be accepted ipso facto by the accession of the State to the Statute for at least a small group of crimes.

Therefore the possibility should be considered to combine the Alternative B with the concept of ipso facto jurisdiction for a relatively small group of crimes, which are beyond all doubt perceived by the international community as the most serious ones, such as those prohibited by Geneva Conventions on the Protection of Victims of War or the Convention against Genocide. In relation to all other crimes, the jurisdiction of the International Criminal Tribunal would be accepted by the "opting out" method.

Thus a kind of basic core of the jurisdiction ratione materiae would be created and States acceding to the Statute would in a credible way demonstrate their resolution to put the mechanism of the Tribunal into motion.

Security Council

The Czech Republic agrees to the concept of the draft Statute which enables the Security Council to submit complaints.

Despite the lack of an explicit provision to this end it would be appropriate for the Security Council to have the right to submit complaint to

the Tribunal only when alleged crimes were committed in situations envisaged in Chapter VII of the Charter. This should be clearly stipulated in the Statute.

It should be also out of any doubt that the general provision requiring the acceptance of jurisdiction of States does not apply and that the right of the Security Council to submit complaints does not depend on the State's consent with the jurisdiction of the Tribunal.